

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WESTERN TOWBOAT COMPANY,

Plaintiff,

v.

VIGOR MARINE, LLC,

Defendant.

IN ADMIRALTY

Case No. 2:20-cv-00416-RSM

MOTION FOR PARTIAL SUMMARY
JUDGMENT

**NOTED ON MOTION CALENDAR:
MAY 27, 2021**

File Date: April 29, 2021
Trial Date: June 28, 2021

MOTION

Defendant Vigor Marine, LLC (“Vigor”) moves the Court for partial summary judgment on its counterclaim for General Maritime Negligence and the parties’ cross claims for breach of contract. *See* Vigor Marine, LLC’s Answer to Plaintiff’s Complaint for Breach of Maritime Contract and for Declaratory Judgment (Dkt. # 15), at 6; Complaint (Dkt. # 1), at 5. The undisputed facts are that Western Towboat Company (“Western”), knowingly and of its own volition, towed a sinking Drydock into a national marine sanctuary where it sank. This conduct violated federal law, breached standards of prudent seamanship, and breached the express language of the towage contract.

MOTION FOR PARTIAL SUMMARY JUDGMENT - 1
CASE 2:20-CV-00416-RSM

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There is no genuine dispute of material fact that Western alone caused the sanctuary damage. Absent Western’s decisions *after* the Drydock was undisputedly unseaworthy, the Drydock would never have been in the sanctuary at all. Therefore, summary judgment is appropriate—Western is solely liable for any and all damages arising from sinking the Drydock *within* the boundaries of the Monterey Bay National Marine Sanctuary (the “Sanctuary”). For the same reasons, Western cannot establish the elements of its breach of contract claim and summary judgment should be granted in Vigor’s favor.

FACTUAL BACKGROUND

A. The tow plan

Vigor hired Western to tow the YFD-70, a decommissioned Drydock (the “Drydock” or “YFD-70”) from Seattle, Washington to its buyer Ensenada, Mexico. Declaration of David Boyajian in Support of Motion for Partial Summary Judgment (“Boyajian Dec.”), ¶ 1, Ex. 1. This Tow Agreement was a “lump sum” contract, under which Western received a set price regardless of how long the voyage took. *Id.*

Vigor hired Richard Shaw of Bowditch Marine, Inc., a reputable marine surveyor, to determine the suitability of Western’s tow vessel (the “OCEAN RANGER”) to tow the Drydock on the proposed voyage, and to prepare a report that included maximum sea state and weather conditions for a safe voyage (the “Draft Survey”). *Id.*, ¶ 2, Ex. 2. Shaw’s Draft Survey provided that “[u]pon receipt of a favorable weather forecast,” the tow could proceed “upon headings and at speeds commensurate with enroute winds, seas, swells, and ambient weather conditions in order to minimize stresses on the hull(s) of Drydock YFD 70 and all components and the tow.” *Id.*

After Shaw, Vigor, and Vigor’s underwriters communicated about Western’s proposed voyage limits, Shaw prepared a final “Trip in Tow Suitability Survey” (the “Final Survey”). *Id.*, ¶ 3, Ex. 3. The Final Survey indicates that the updated “Towing and Voyage Recommendations were submitted to and reviewed with Western’s Port Captain Russel

Shrewsbury and submitted to Capt. Steven McGav[ock], Master, Tug OCEAN RANGER.”

Id. It also required:

Tug OCEAN RANGER is to proceed upon headings and at speeds commensurate with en route winds, seas, swells, and ambient weather conditions in order to minimize stresses to the hull(s) of Drydock YFD 70 and all components of the tow. The Master of Tug OCEAN RANGER shall **avoid heavy head or beam seas (greater than 8-10 ft.)** to avoid pitching or rolling and ensure that seamanship techniques are employed to minimize the effects of head seas and rolling upon Drydock YFD 70. Special attention should be given to the Tug's horsepower in relation to the weight of the tow(s) to minimize stress on the bow and side shell hatch structure(s).

The Master of the Tug OCEAN RANGER is not to proceed from any safe port or sheltered waters during the voyage without first determining that **reasonable weather conditions (less than Force 6) are predicted along his intended track**, nor is he to proceed at speeds excessive for the prevailing weather or for any regulated waterways the tow may transit.

Id. (emphasis added)

Western accepted and incorporated the revised and reduced recommended sea state and wind conditions (although Western inexplicably changed the wind restriction from “less than Force 6” to “20-25 knots”, which is slightly higher) in a Tow Plan Amendment, which Western sent back to Vigor. *Id.*, ¶ 4, Ex. 4.

B. The voyage

On October 17, 2016, the OCEAN RANGER departed Western’s dock at 0900 hrs., picked up the Drydock at Vigor’s shipyard at about noon, and made its way west through Puget Sound. *Id.*, ¶ 5, Ex. 5. The tug reached the “open ocean” sometime between 1400 hrs. and 1700 hrs. on October 18, 2016, depending who you ask. *See, e.g., id.*

By 1000 hrs. the following morning, the OCEAN RANGER was plowing south through conditions exceeding the tow’s wind restrictions. Those conditions continued for at least 16 hours, until subsiding around 0200 hrs. on the morning of October 20, 2016. *Id.* A couple days of fair weather followed. *Id.*

1 On Saturday, October 22, 2016, the tow encountered 6-plus hours of significant wave
2 heights that, again, eventually abated. *Id.*

3 Then, from 1400 hrs. on October 23, 2016, through 1400 hrs. on October 24, the tow
4 passed through another 24-hours of conditions exceeding the tow restrictions, including ten
5 straight hours of 35-plus knot winds on the nose and several hours of 10–12 foot seas. *Id.*

6 Twenty-four hours after that storm abated, the OCEAN RANGER’s crew noticed the
7 Drydock was listing. *Id.*

8 At 1430 hrs. on October 25, 2016, Captain McGavock called a meeting with his
9 Mates. *Id.*, ¶ 6, Ex. 6. They all agreed the Drydock was taking on water. *Id.* They noted the
10 Drydock had taken on a “port bow list” in the OCEAN RANGER’s log and altered course to
11 seek refuge and possible assistance in San Francisco Bay. *Id.*, ¶ 5, Ex. 5.

12 At 1500 hrs., Western alerted the United States Coast Guard of the OCEAN
13 RANGER’s position—just outside the western boundary of the Greater Farallones National
14 Marine Sanctuary—and the Drydock’s deteriorating stability. *Id.*

15 Throughout discovery, the parties have disputed *why* the Drydock began taking on
16 water. But it is undisputed that Western knew the Drydock was taking on water and that its
17 stability was deteriorating by mid-afternoon on October 25, 2016. Similarly, what Western
18 did and did not do *after* the Drydock began listing and was in danger of sinking is
19 undisputed.

20 On its altered course towards San Francisco Bay, the OCEAN RANGER entered the
21 Greater Farallones National Marine Sanctuary. *See* Boyajian Dec., ¶ 7, Ex. 7. Over the next
22 few hours, Western concluded the list was getting worse, i.e., the Drydock was taking on
23 more water such that the tow could not safely transit San Francisco’s Golden Gate because, if
24 the Drydock “sunk anywhere in that entrance area, it would be a national disaster.” *Id.*, ¶ 8,
25 Ex. 8, at p. 5.

26 Bob Shrewsbury (one of Western’s owners, and an experienced offshore towing

1 master) testified that he personally rerouted the tug and tow toward Monterey Bay. *Id.*, ¶ 8,
 2 Ex. 8, at p. 6. Captain McGavock later reported to the Coast Guard that at around 1800 hrs.
 3 on October 25, 2016, “I made [a] decision to sail away from the termination of West/East
 4 bound SF marine traffic lanes. I plotted a SSE course for Pioneer Canyon in case we had to
 5 abandon the sinking tow.” *Id.*, ¶ 9, Ex. 9.

6 Shortly after 1800 hrs. on October 25, 2016, the OCEAN RANGER crossed the
 7 southern boundary of the Greater Farallones National Marine Sanctuary and proceeded into
 8 the un-protected open ocean (*i.e.*, not in a federally-protected marine sanctuary). *Id.* ¶ 7, Ex.
 9 7. Captain McGavock stated that, at around this time, “it became apparent the tow would not
 10 make it. I contacted [Western Towboat Company] and [the Coast Guard] and [sic] decision
 11 was made to head out of the traffic lanes and [Greater Farallones] sanctuary area and into as
 12 deep water as possible.” *Id.*, ¶ 6, Ex. 6. Bob Shrewsbury was “getting more and more
 13 concerned talking to the guys and what they could see with the conditions they had there and
 14 I told them to head for deeper water.” *Id.*, ¶ 8, Ex. 8, at p. 9–11. At around 6:28 p.m., Bob
 15 Shrewsbury explained his decision to reroute to Monterey Bay in an email to Vigor’s
 16 Dockmaster Dan Keen, noting “We do not want the Dock to sink where it would have to be a
 17 Major Salvage job.” *Id.*, ¶ 10, Ex. 10. Vigor’s Dan Keen agreed. Unfortunately, when
 18 Western took the sinking Drydock into the Monterey Bay National Marine Sanctuary that is
 19 exactly what Western invited.

20 Instead of identifying deep water *outside* of federally protected National Marine
 21 Sanctuaries, Capt. McGavock plotted a course SSE, directly into the Monterey Bay National
 22 Marine Sanctuary. *Id.*, ¶ 7, Ex. 7; ¶ 9, Ex. 9. Despite contrary assertions in Western’s
 23 complaint, Bob Shrewsbury testified that he personally decided to reroute the tow to
 24 Monterey, without direction from Vigor. *Id.*, ¶ 8, Ex. 8, at p. 10–11. But Bob Shrewsbury
 25 also testified that “I wasn’t aware of how close he [Captain McGavock] was to the sanctuary,
 26 if he was in one,” this despite the fact the Sanctuaries’ boundaries are clearly marked on the

1 navigational charts. *Id.* Nonetheless, Captain McGavock’s boss told him to head towards and
 2 into the Sanctuary.

3 Around 2230 hrs., the OCEAN RANGER crossed into the Monterey Bay National
 4 Marine Sanctuary with what Captain McGavock had already concluded was “the sinking
 5 tow.” *Id.*, ¶ 9, Ex. 9.

6 The National Marine Sanctuaries’ boundaries are marked with a thick bright-blue
 7 outline on the relevant navigational charts. Large blue font, all capital letters, identify the
 8 Sanctuaries by name, note they are “protected area[s]”, and refer users to both the chart’s
 9 notes and the relevant section of the CFR (“15 CFR 922”). *See id.*, ¶ 7, Ex. 7.¹ Printed right
 10 on the relevant charts, the referenced chart note states:

11 NATIONAL MARINE SANCTUARIES

12 National Marine Sanctuaries are protected areas, administered by NOAA which
 13 contain abundant and diverse natural resources such as marine mammals,
 14 seabirds, fishes and tidelpool invertebrates. These are particularly sensitive to
 15 environmental damage such as spills of oil and other hazardous materials,
 16 discharges, and groundings. Exercise particular caution and follow applicable
 Sanctuary regulations when transiting these areas to avoid environmental
 impacts. A full description of Sanctuary regulations may be found in 15 CFR
 Part 922 and in the Coast pilot.

17 Captain McGavock stated that “[a]t 2300 I held a safety meeting to discuss the
 18 evolution and process of releasing the tow if circumstances required”, i.e. how to cut the tow
 19 free when it sunk. *Id.*, ¶ 6, Ex. 6.

20 Three hours later, the OCEAN RANGER was still in the Sanctuary when the
 21 Drydock capsized. *Id.* By 0305 hrs., the Drydock slipped below the waves less than one mile
 22 on the wrong side of the Sanctuary border. *Id.*; *see also, id.*, ¶ 7, Ex. 7.

23
 24
 25
 26 ¹ A scalable, online version of this chart is available on NOAA’s website at
<https://charts.noaa.gov/PDFs/18680.pdf> (last visited April 29, 2021).

C. NOAA's penalty

In early November, 2016, NOAA's Scott Kathey informed Vigor that NOAA concluded the Drydock sank 0.92 miles inside the western boundary of the Monterey Bay National Marine Sanctuary. Boyajian Dec., ¶ 12, Ex. 12. A July 2018, Vigor-funded deep-sea survey and ROV dive(s) confirmed the YFD-70 had damaged the submerged lands, surrounding habitat, and possibly unique deep-sea flora and fauna within the Sanctuary. *Id.*, ¶ 13.

On January 19, 2021, NOAA sent letters to Vigor, Western, and Amaya Curiel (the Drydock's purchaser) advising the parties that NOAA considers them liable for damages to the Sanctuary caused by the sinking of YFD-70. Boyajian Dec., ¶ 14, Ex. 14.

D. Procedural background

Western's complaint (Dkt. # 1) asserts two claims, one for breach of contract based on Vigor's refusal to pay Western's towage fee for the ill-fated voyage, and one seeking declaratory judgment that Western has no liability to the United States for any Sanctuary damage. Vigor answered (Dkt. # 15), and asserted counterclaims for general maritime negligence based, *inter alia*, on Western's decision to steer into the Sanctuary when it knew the Drydock could or would sink. Vigor also asserts claims for breach of contract, attorney fees and costs, and unjust enrichment. Because NOAA's penalty assessment has not issued and related facts remain undetermined, Vigor also filed motions to extend discovery and pretrial deadlines (Dkt # 28) and to stay the case upon completion of discovery, pending NOAA's penalty assessment (Dkt # 31). Western opposed the motions (*see* Dkt. ## 34, 35). Western intimated for the first time that it intended to move for summary judgment (*see* Dkt. # 35, at 6 n.5).

In light of Western's surprising position, and identifying no genuine disputes of material fact regarding how the Drydock ended up inside the Sanctuary, Vigor moves for summary judgment. Further, because Western's admitted actions breached the towage

1 contract, Western cannot establish the elements of a maritime breach of its contract claim as
 2 a matter of law. As the Court has not ruled on Vigor's motion to extend deadlines, and as
 3 today is the deadline for dispositive motions, Vigor files this Motion for Partial Summary
 4 Judgment because there is no genuine issue of material fact: Western breached the towage
 5 contract and is solely at fault for violating the Marine Sanctuaries Act.

6 Vigor's counsel conferred, yesterday, by telephone with Western's counsel about the
 7 three issues raised in Vigor's Motion for Partial Summary Judgment. The parties were unable
 8 to resolve or narrow any of the issues. Western's counsel indicated that Western intended to
 9 file their own motion for summary judgment, but asserted that the Local Rules do not require
 10 conferral on dispositive motions, and chose not disclose the grounds for or issues raised by
 11 their intended motion(s).

12 ARGUMENT

13 A. Summary judgment standard

14 Summary judgment is appropriate when the pleadings, depositions, answers to
 15 interrogatories, and admissions on file, together with the affidavits, if any, show that there is
 16 no genuine issue as to any material fact and that the moving party is entitled to judgment as a
 17 matter of law. Fed. R. Civ. P. 56(a). An issue is "genuine" only if there is sufficient evidence
 18 for a reasonable fact finder to find for the nonmoving party. *Anderson v Liberty Lobby, Inc.*,
 19 744 U.S. 242, 248–49 (1986). A fact is "material" if it could affect the outcome of the case.
 20 *See id.* at 248.

21 The moving party bears the initial burden of demonstrating the absence of a genuine
 22 issue of fact for trial. *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (citing
 23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). When the nonmoving party has the
 24 burden of proof at trial, the moving party need only point out that there is an absence of
 25 evidence to support the nonmoving party's case. *Id.* Once the moving party carries its initial
 26 burden, the adverse party may not rest upon the allegations or denials of the adverse party's

pleading(s), but must provide affidavits or other sources of evidence that set forth specific facts showing there is a genuine issue for trial. *Id.* (citing Fed. R. Civ. P. 56 (e)).

“Summary judgment is not precluded simply because there is a dispute of some facts in a case.” *School Dist. No. 1J, Multnomah Co., v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994). To avoid summary judgment, the nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A scintilla of evidence in support of the nonmover’s position is insufficient; there must be evidence upon which the jury could reasonably find for the nonmoving party. *Anderson*, 477 U.S. at 250–51. “When the nonmoving party relies on its own affidavits to oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact.” *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993) (Per Curiam).

B. Vigor is entitled to summary judgment on its claim for general maritime negligence

1. Western breached its duty of reasonable care when it knowingly towed the sinking Drydock into the Monterey Bay National Marine Sanctuary

A general maritime law negligence claim shares the basic elements of a common law negligence claim: “a duty, a breach of the duty, proximate cause, and damages.” *Prince v. Thomas*, 25 F. Supp. 2d 1045, 1047 (N.D. Cal. 1997). A “duty of reasonable care under the circumstances” applies in maritime negligence actions. *Christensen v. Georgia-Pac. Corp.*, 279 F.3d 807, 815 (9th Cir. 2002) (citing *Peters v. Titan Nav. Co.*, 857 F.2d 1342, 1345 (9th Cir. 1988)).

Maritime cases tell us specifically how these standards apply to towboat operations. A tug owner must perform its duties with such reasonable care and maritime skill as prudent navigators usually employ in similar undertakings, and with such consideration as special

1 circumstances may require. *Stevens v. The White City*, 285 U.S. 195, 202, 52 S. Ct. 347, 350
 2 (1935); *Aiple Towing Co., Inc. v. M/V Lynne E. Quinn*, 534 F. Supp. 409, 411 (E.D. La.
 3 1982); *M. P. Howlett Inc. v. Tug Dalzellido*, 324 F. Supp. 912, 917 (S.D.N.Y. 1972). The
 4 degree of care required of a tug is measured with reference to the character of the tow and the
 5 condition of the seas and weather. *Aiple Towing*, 534 F. Supp. at 411; *See also M. P.*
 6 *Howlett*, 324 F. Supp. at 916–917; *The Wyoming*, 58 F.2d 789 (D. Mass. 1932); *The*
 7 *Mercury*, 2 F.2d 325 (1 Cir. 1924). A tug owner may be directly negligent for breaching its
 8 duties to consider the undertaking of the tow and intervene with regard to the decision of its
 9 captain when the circumstances require that intervention and there is opportunity to do so.
 10 *The Linseed King*, 285 U.S. 502, 510–11, 52 S. Ct. 450, 452 (1932); *Or. by State Highway*
 11 *Com. v. Tug Go-Getter*, 468 F.2d 1270, 1275 (9th Cir. 1972); *Waterman S.S. Corp. v. Gay*
 12 *Cottons*, 414 F.2d 724, 732 (9th Cir. 1969).

13 Critically, Western’s job and responsibilities changed once they knew the YFD-70
 14 was taking on water and losing stability: Once a tower knows its tow is unstable, the tower
 15 has a duty to take reasonable measures to avoid the worst consequences. *See generally,*
 16 *Houma Well Serv., Inc. v. Tug Capt. O’Brien*, 312 F. Supp. 257 (E.D. La. 1970). The
 17 evidence in this case establishes that Western failed on this charge.

18 In *Houma*, tugs towed barges through shallow water in the Mississippi River. *Id.* at
 19 259. One of the barges appeared to be taking on water and capsized. *Id.* As here, the parties
 20 disputed whether the barge was unseaworthy at the outset of the voyage or became
 21 unseaworthy as the tower dragged it over mud flats and oyster beds, i.e., there were issues of
 22 fact over which party caused the unseaworthy condition. *Id.* As is true here, the *Houma* court
 23 determined that question doesn’t matter.

24 Instead, the *Houma* court observed, the tug’s crew “not only were aware of the
 25 manifestations of unseaworthiness but also were concerned about the barge’s safety” “from
 26 the time she was taken in tow.” *Id.* at 261–62. Because the evidence indicated the tug’s

1 captain should have taken prompt action to stop the tow when the crew first observed the
 2 unseaworthy condition, or to run the unseaworthy barge to a safe resting place, the *Houma*
 3 court ruled the tug “breached the duty it owed and this breach was the proximate cause of the
 4 accident,” ruling that “[o]ne who elects to ply his trade by running time-honored risks may
 5 do so at the peril of liability if the risk materializes.” *Id.* at 262.

6 *Houma* also analyzed the doctrine of mutual fault and concluded it does not apply
 7 where the tug, upon seeing the tow’s unseaworthy condition, “has the final opportunity, as
 8 well as the duty, to avert the damage, sometimes called the last clear chance.” *Id.* at 263. In
 9 fact, where the tug and the tow both contribute to the end result, if the unseaworthiness of the
 10 tow becomes “obvious to the tug in time for the tug to accommodate her own navigation to
 11 the emergency, the tug alone was liable.” *Id.* (quoting *Chem. Transporter, Inc. v. M.*
 12 *Turecamo, Inc.*, 290 F.2d 496, 497 (2d Cir. 1961)) (emphasis added).

13 This bears repeating: regardless of how or when a tow became unseaworthy, once the
 14 tower becomes aware of the tow’s imperiled condition the tower alone has the duty minimize
 15 the damages the sinking tow causes. Accordingly, *Houma* entered judgment in favor of the
 16 barge owners on liability, reserving damages to be resolved in settlement negotiations or
 17 further proceedings. *Id.* at 264. This Court should follow *Houma*’s lead.

18 Western cannot raise a genuine dispute regarding its breach of these standards of
 19 care. It is undisputed that Western noticed the Drydock was taking on water and listing after
 20 eight days at sea and roughly 13 ½ hours before it sank. *See* Boyajian Dec., ¶ 5, Ex. 5. Bob
 21 Shrewsbury testified that he decided to tell Captain McGavock to steer away from San
 22 Francisco Bay because he thought sinking the Drydock there would be a “national disaster”
 23 necessitating a “major salvage operation” *See* Bob Shrewsbury’s deposition and email to Dan
 24 Keen, Boyajian Dec., ¶ 8, Ex. 8; ¶ 10, Ex. 10. Captain McGavock told the Coast Guard,
 25 under penalty of perjury, that at around 1800 hrs. on October 25, 2016, “I made [a] decision
 26 to sail away from the termination of West/East bound SF marine traffic lanes. I plotted a SSE

1 course for Pioneer Canyon in case we had to abandon the sinking tow.” *Id.*, ¶ 9, Ex. 9.
 2 Knowing the tow was in grave peril and might sink, the OCEAN RANGER irrefutably
 3 exited the Greater Farallones National Marine Sanctuary around 1800 hrs. on October 25—
 4 Captain McGavock noted it in the OCEAN RANGER’s logbook. *Id.*, ¶ 5, Ex. 5. At that
 5 location and across the vessel’s track for the next 4 ½ hours, through open ocean not within
 6 the boundaries of any protected waters, Western cannot dispute that it could have let the
 7 Drydock sink there without exposing itself and Vigor to NOAA’s sanctuary restoration
 8 damages and related penalties. This bears repeating: had Western simply stopped, stayed put,
 9 hove to, or otherwise held position in the deep water *outside* the National Marine
 10 Sanctuaries, nobody would be liable to the federal government.

11 Instead, unquestionably, the OCEAN RANGER plotted a course directly towards and
 12 then entered the Monterey Bay National Marine Sanctuary around 2230 hrs., where the
 13 Drydock’s condition continued to deteriorate for another 4 ½ hours. Bob Shrewsbury
 14 testified that he alone made the decision to direct the vessel on this course, and that he did so
 15 without appreciating the consequences of sinking the Drydock in the Sanctuary. Captain
 16 McGavock steered the vessel to this location having admittedly known since the previous
 17 afternoon that he may have to “abandon the sinking tow.” Captain McGavock held a meeting
 18 about abandoning the tow at 2300 hrs., just after entering the Sanctuary but still more than
 19 four hours before the sinking. Boyajian Dec., ¶ 6, Ex. 6. No matter how the Drydock came to
 20 be unseaworthy, by 1800 hrs. (if not sooner), Western **knew** the Drydock was unseaworthy.
 21 At that point, there can be no dispute about the Drydock’s unseaworthy condition. Western
 22 could see the Drydock, and they reported (through their office) to Vigor that the Drydock
 23 was in danger. *Id.* They reported the same to the United States Coast Guard. At that point,
 24 Western’s job had changed—it was their job to try to minimize further damages, to attempt
 25 to save the Drydock, or, failing that, to find a safe place to let it sink.
 26

1 While Western was in unprotected waters, it could have slowed down, stopped, or
 2 hove to, to remain there until sunrise. Captain McGavock could have turned South or West,
 3 which would have kept the tow outside the Sanctuary. Instead, Captain McGavock proceeded
 4 into the Sanctuary and remained there for over four hours, despite the clear chart markings
 5 warning about the Sanctuary's risks. Further, Captain McGavock's written post-incident
 6 statement to Western's Port Captain stated that McGavock understood that it was important
 7 to "head out of the traffic lanes and sanctuary area"² when he diverted away from San
 8 Francisco, but *hours* before he headed into the Monterey Bay Sanctuary. Boyajian Dec., ¶ 6,
 9 Ex. 6.

10 In light of the foregoing, there is no genuine dispute of material fact that Western
 11 breached its duty of reasonable care by failing to give sufficient attention to the special
 12 circumstances involved in and risks presented by directing the sinking Drydock to a safer
 13 location. *See Aiple Towing Co. v. M/V Lynne E. Quinn*, 543 F. Supp. 409, 411 (E.D. La. Mar.
 14 2, 1982). Western had ample opportunities to avoid sinking the Drydock in a federally-
 15 protected Marine Sanctuary—Western spent 4+ hours transiting non-protected open ocean
 16 waters en route to the Monterey Bay National Marine Sanctuary *after* it knew the Drydock
 17 was likely to sink. Like the tug operators in *Houma*, Western was aware of the Drydock's
 18 "manifestations of unseaworthiness" and concerned about its safety when Western elected to
 19 run the risk of towing an unseaworthy tow away from the safest and least harmful place to let
 20 it sink: deep water outside the Sanctuary.

21 Like the tugs in *Houma*, the OCEAN RANGER had ample opportunity to
 22 "accommodate her own navigation to the emergency" caused by the sinking Drydock.
 23 Because Western cannot raise a genuine dispute of material fact that it did not make such a
 24

25
 26 ² Presumably, the Greater Farallones National Marine Sanctuary, which the OCEAN
 RANGER was transiting en route to San Francisco Bay.

1 prudent accommodation, Vigor is entitled to judgment as a matter of law that Western alone
2 is liable for any damages that arise from causing the Drydock to sink within the Sanctuary.

- 3 2. Western is presumptively liable for sanctuary damages and must show
4 by clear and convincing evidence that its negligence could not have
proximately caused the sanctuary damage

5 Under admiralty's Pennsylvania Rule, if a vessel's alleged liability results from a
6 statute or regulatory violation, it is presumed that the ship owner was at fault, and the burden
7 of proving causation shifts to the ship owner. *MacDonald v. Kahikolu, Ltd.*, 581 F.3d 970,
8 973 (9th Cir. 2009). The burden imposed by the Pennsylvania Rule has been often applied in
9 the Ninth Circuit and described as "difficult, if not impossible," to discharge. *Id.* at 974. The
10 presumption is rebutted only where the defendant shows by clear and convincing evidence
11 that the violation could not reasonably have been a proximate cause of the injury. *Id.*

12 Western violated the National Marine Sanctuaries Act, 16 U.S.C. 1431–1445c-1. The
13 Act makes it unlawful to discharge or deposit from within or into the Sanctuary, any
14 material, or to place or abandon any structure on or in its submerged land, subject to certain
15 exceptions that do not apply here. 15 C.F.R. §§ 922.132(a)(2)(i), 922.132(a)(4). It is also
16 illegal to desert a vessel aground, at anchor, or adrift in the Sanctuary. *Id.*, § 922.132(a)(9).
17 Accordingly, Western is presumptively at fault for the sanctuary damage unless it can show
18 by clear and convincing evidence that the violation could not reasonably be held to have
19 been a proximate cause of the damage, which it cannot in light of Western's unilateral
20 decision to take the sinking Drydock into the Sanctuary.

21 The Pennsylvania Rule also applies where a vessel captain fails to familiarize himself
22 with the obstructions in the area of his voyage and to update his charts in violation of
23 statutory regulations governing mariners. *See Tidewater Marine v. Sanco Int'l, Inc.*, 113 F.
24 Supp. 2d 987, 1003 (E.D. La. 2000) (citing 33 C.F.R. § 164.33. 33 and § 164.30 in ruling
25 that the failure triggered the Pennsylvania Rule, although not finding the fault a superseding
26 cause of the allision for fact-specific reasons).

Here, Captain McGavock, Bob Shrewsbury, Russell Shrewsbury and John Cowgill (the OCEAN RANGER's chief mate) admittedly did not familiarize themselves with the hazards presented by the Sanctuary, which are clearly identified (in big bright-blue lines and letters) on the charts and with which they were statutorily mandated to be familiar. *See REXACH v. Sec'y OF THE NAVY*, CIVIL No. 75-408, 1978 U.S. Dist. LEXIS 19588, at *25 (D.P.R. Feb. 14, 1978) (quoting Chapman, *Piloting, Seamanship & Small Boat Handling*, at p. 417: "It is the duty of a skipper to fix the position of his craft with such degree of precision and at such frequent intervals as is required by the proximity to hazards to safe navigation.").

Western's failure to familiarize itself with the consequences of sinking the Drydock in the Sanctuary, and its disregard for the clear warning printed on the nautical charts, are additional reasons Western bears the burden of showing by clear and convincing evidence that its decision to enter the Sanctuary and remain within it until the Drydock sank could not be a proximate cause of the sanctuary damages. Because it cannot meet this burden, summary judgment is appropriate on Vigor's claim for general maritime negligence.

C. Vigor is entitled to summary judgment in its favor on the parties' cross claims for breach of contract

Summary judgment in Vigor's favor is also appropriate on the parties' cross claims for breach of contract. *See* Complaint (Dkt. # 1), at 5, Answer (Dkt. # 15), at 6. To establish a maritime breach-of-contract claim, a plaintiff must demonstrate "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Jackson v. Royal Caribbean Cruises, Ltd.*, 389 F. Supp. 3d 431, 455 (N.D. Tex. 2019) (citing *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co.*, 375 F.3d 168, 177 (2d Cir. 2004)). Western cannot demonstrate the second element of "adequate performance," so its breach of contract claim fails as a matter of law.

Section 7.B of the towage contract provided that "Should the Tow become disabled, breakaway or be otherwise unfit to continue the voyage . . . Customer [Vigor] shall be

1 notified and the Tug shall either take the tow to the nearest safe port/place or stand by the
 2 Tow until other assistance is rendered.” Boyajian Dec., ¶ 1, Ex. 1. Western could not have
 3 adequately performed the towing contract since it towed the Drydock into the Sanctuary
 4 instead of the “nearest safe port/place.”

5 Here, Western knew the Drydock had become “disabled” and “unfit to continue the
 6 voyage.” But, rather than take the disabled tow to a place where it might safely sink (or
 7 safely ride out the night, and be reevaluated in the light of a new day), they towed it into a
 8 National Marine Sanctuary. Bob Shrewsbury testified that he alone made the routing
 9 decision that led into the Sanctuary, and Captain McGavock reported that he plotted and set
 10 the SSE course straight into the Sanctuary. At that time, Shrewsbury and McGavock
 11 admittedly believed the Drydock was likely to sink. But the OCEAN RANGER didn’t hold
 12 the disabled Drydock in position outside the Sanctuary (that would have been a safe place for
 13 it to sink). Western instead towed the listing, disabled, sinking Drydock into the Monterey
 14 Bay National Marine Sanctuary, in breach of Section 7.B of the tow agreement. Thus, Vigor
 15 is entitled to summary judgment in its favor on the cross claims for breach of contract.

16 CONCLUSION

17 Once Western knew the Drydock was unseaworthy, it had a duty to consider the
 18 special circumstances and risks presented by the tow’s condition and position, including
 19 sinking a Drydock in a National Marine Sanctuary, and to adapt its navigation to the
 20 particulars of the pending emergency. But Western had no fewer than 3 other licensed
 21 towing masters line up behind Bob Shrewsbury’s decision to head for Monterey. Not one of
 22 them raised the issues presented by the Marine Sanctuaries. Not one of them asked the
 23 USCG (during the already-established hourly communications) where they should and
 24 shouldn’t be if and when the sinking Drydock sunk. Not one of them looked up what the
 25 bright-blue lines and letters marking the Sanctuaries on the NOAA charts meant (nor,
 26 apparently, did any of them read the chart note explaining the risk(s) posed by the Sanctuary,

1 even though it is printed right on the relevant charts). And not one of them communicated to
 2 Vigor the significant risks involved in taking a sinking Drydock into Monterey.

3 Because Western has admitted that it did not appreciate, understand, consider, or
 4 communicate those risks, “the tug alone” is liable to the United States for sanctuary damages.
 5 Western cannot show by clear and convincing evidence that its decisions after the Drydock
 6 was undisputedly unseaworthy could not be a proximate cause of the damages because there
 7 is no genuine dispute of material fact about why the Drydock sank in the Sanctuary as
 8 opposed to one mile further west, in non-protected waters (where it had been just a few hours
 9 earlier). Moreover, these breaches dictate that Western cannot establish it adequately
 10 performed the contract. Thus, Vigor respectfully requests the Court grant partial summary
 11 judgment in Vigor’s favor that Western is solely liable for damages to the Sanctuary, and that
 12 Western’s claim for breach of contract fails as a matter of law because Western breached the
 13 contract.³

14 Dated this 29th day of April, 2021.

15 SCHWABE, WILLIAMSON & WYATT, P.C.

16
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3 If this Court grants Vigor’s motion, only Vigor’s counterclaims for fees and costs and unjust enrichment will remain, with damages to be proven at trial or by further motion.

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2021, I served the following MOTION TO STAY
PROCEEDINGS on:

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☒ by electronically filing the foregoing with the Clerk of the Court using the
CM/ECF system, which will send notification of such filing to all associated counsel.

/s/ David R. Boyajian
David R. Boyajian